(1)

Supreme Court, U.S.
FILED

941633 APR 3 - 1995

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DUANE C. BAKER,

Petitioner,

v.

DONNA L. BAKER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE
COURT OF APPEALS
STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

Duane C. Baker
Pro Se
— —
Box 39571
Fort Lauderdale, FL 33339-9571
(305) 493-7372

70 pp

QUESTIONS PRESENTED

1. Whether the use of religion in any consideration of award of child custody is contrary to the First Amendment of the United States Constitution?

2. Whether the educational degree enhanced earning capacity lifetime awards given to the non-degree holding spouse in New York's DRL § 236, Pt. B, Subd. 6, is contrary to the Thirteenth Amendment of the United States Constitution as determined by Florida courts in Severs v. Severs, 426 So.2d 992?

3. Whether the inclusion of income from extra hours worked from overtime, nights, and holidays, into enhanced earning capacity cases is contrary to the Thirteenth Amendment of the United States Constitution?

4. Whether such distributive awards given on educational degrees are contrary to the Fourth Amendment of the United States Constitution as degrees are not property and are exclusively personal to the holder?

TABLE OF CONTENTS (cont.)

determined that the defendant's degree was marital property, therefore the enhanced earning capacity award was contrary to the Fourth Amendment of the United States Constitution. 13

E. The State of New York improperly included income from extra hours worked from overtime, nights, and holidays, into it's enhanced earning capacity calculations which is contrary to the Thirteenth Amendment of the United States Constitution. 17

F. The State of New York improperly awards attorney's fees in enhanced earning capacity cases contrary to the Fourteenth Amendment of the United States Constitution and other state decisions. 18

G. An award of attorney's fees is improper when the actual proceedings were improper. . 20

H. The State of New York improperly awarded maintenance contrary to Amendment Thirteen of the United States Constitution. . . . 21

CONCLUSIONS 23

TABLE OF AUTHORITIES

CASES: Page

Cohen v. Cohen, 154 A.D.2d 808, 546 N.Y.S. 2d 473. 21

De La Torre v. De La Torre, 583 N.Y.S.2d 479. 21

Diamond v. Diamond, 519 A.2d 1012. 19

In re. Marriage of Graham, 194 Col. 429, 432; 574 P.2d 75, 77. 9

GrossKoph v. GrossKoph, 677 P.2d 814. . . 10, 16

Hill v. Hill, 747 S.W.2d 718. . . . . 14, 15, 25

Hoover v. Hoover, 431 A.2d 337. 19

Lesman vs. Lesman, 452 N.Y.S.2d 935,938; 88 A.D.2d 153. . . . . 10, 11, 12, 22, 23

Mahoney v. Mahoney, 453 A.2d 527 . . 11, 22, 23

Maloney v. Maloney 524 N.Y.S.2d 758. 20

Melrod v. Melrod, 574 A.2d 1,3 (Md.App. 1990) 14

O'Brien v. O'Brien, 498 N.Y.S.2d 743 . . 21, 24

Oswald v. Oswald, 154 A.D.2d 817, 818; 546 N.Y.S.2d 475). 21

Patterson v. Patterson, 343 S.E.2d 595. . . . 19

Pope v. Pope, 587 A.2d 481. . . . . 14, 15, 25

Severs v. Severs, 426 So.2d 982. . . . . 7, 24

TABLE OF AUTHORITIES (cont.)

Stern v. Stern, 66 N.J. at 346-47 n. 5, 331; A.2d 257 (1975). 10

Sperling v. Sperling, 567 N.Y.S.2d 538. . . . 22

LAWS

Amendment I of the United States Constitution. 6, 24

Amendment IV of the United States Constitution. 8, 9, 13, 17, 25, 26

Amendment XIII of the United States Constitution. 7, 22, 24, 26

Amendment XIV of the United States Constitution. 18, 25, 26

10 U.S.C. § 2120 - 2127, Chapter 105 - "Armed Forces Health Professions Scholarship Program". 4, 14

TITLE 28 U.S.C. § 1257. 1

McKinney's DRL § 236, Pt. B, Subd. 6. 22

Maryland Family Law, § 8 - 201(e). . . . 13, 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Duane Baker, prays that a Writ of Certiorari issue to review the Judgement of the Court of Appeals of the State of New York entered in this case on January 17, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, which is unreported, is set forth at A. (1a)[1].

JURISDICTION

The judgement of the Court of Appeals of the State of New York was entered on January 17, 1995. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1257.

STATUTES INVOLVED

The text of the following statutes relevant to the determination of the present case, are set forth below:

---

[1] References to "A." are to the appendix to this petition.

AMENDMENT I of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for redress of grievances.

AMENDMENT IV of the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmantion, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIII of the United States Constitution

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction.

AMENDMENT XIV of the United States Constitution

Section 1. ... No State shall make or enforce any law which shall abridge the priviledges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Duane Baker was the defendant of a divorce case in the state of New York. New York did not have no-fault divorce options at that time. The plaintiff was to pursue her action for divorce on an uncontested basis under the agreement amd motion that there would not be any prejudice to any other issues in the divorce.

During the trial the Plaintiff's lawyer declared that Dr. Baker should not share in any legal custody of his children explaining,

"As an example, religion, all right, they are not in agreement about religion.... Mrs. Baker is converting to Catholocism and is going to have the children baptized in the the Catholic religion. Dr. Baker, as I understand it, is either not practicing in any religion or does not believe in any religion, or whatever.... I do know he is not a Catholic. I know he is not converting to Catholocism."

Finonocchio, Trial Transcript vol. II, pgs. 143 - 144.

This was the only reason the plaintiff gave for denying Dr. Baker any custody of his children. At the end of the trial Donna Baker was awarded full legal custody of the children (Judge Hayes, Trial transcript p. 884), and

therefore Dr. Baker was not entitled to have any legal custody of his children, nor was he allowed to make any legal decisions to help guide them through the rest of their lives.

It is was later discovered by the Petitioner that Hon. Leo F. Hayes is a devout Catholic and his brother is a priest.

Dr. Baker's Medical Degree was totally financed by the United States Air Force, his parents, and personal loans which he is soley responsible for. Dr. Baker's parents totally financed his first year of medical school. Under 10 U.S.C. § 2120 - 2127, Chapter 105 - "Armed Forces Health Professions Scholarship Program" the Air Force totally paid for the remaining years, tuition, books, and fees, while also providing a stipend to live on. No marital funds were used to repay any of these sources. In addition Dr. Baker's parents bought him and his wife a car and totally financed his wife's (the plaintiff's) last year of college.

Furthermore, Dr. Baker expended every reasonable measure to support his wife in

obtaining another degree (Registered Dietitian) during the marriage, including giving her their only car and traveling great distances to move her up to Yale. The day prior to her starting her program she quit. She had an additional chance to obtain this degree during the marriage was enrolled and started part of her program and quit again.

At the divorce trial Donna Baker testitified to having completed her studies except for one exam and was already employed in the career field of her choice.

Judge Leo F. Hayes awarded Donna Baker, the Plaintiff, $142,000.00 as part of the enhanced eanings Duane Baker would make as a result of his medical degree. Donna Baker was also awarded attorney's fees and maintenence. The maintenance included all mortgage, taxes and insurance, and all basic utility expences to maintain the marital residence (Appendix 29a, 33a - 34a).

REASONS FOR GRANTING THE WRIT

I. The New York Judicial System has rendered a decision that is in conflict with the United

States Constitution, four Constitutional Ammendments, and other State Courts.

A. The use of religion in any consideration of award of child custody is contrary to the First Amendmendment of the United States Constitution.

This is so clearly unjust it does not require a cite. It was clearly determined during the trial that Dr. Baker is a Physician, his father is a physician and his family has history of service to this country. Dr. Baker was in the United States Air Force and served in Desert Storm, while his father and each of his three brothers also served this country in the military. Certainly this would entitle Dr. Baker to be able to take part in guiding his children's future. Criminals, drug addicts, and child abusers have been given greater rights.

The use of religious prejudice in this case merits review by this court without awaiting further resolve of any issues by a clearly prejudiced trial court. It is also submitted that this unjust prejudice was a guiding factor

in not only the award of child support but also in the determination of the rest of the decision. Any return of issues will only result in further unjustly colored decisons by the trial court and continue to be contrary to Dr. Baker's First Amendment rights. This also merits an award to Dr. Baker the releif requested within this writ (which includes physical custody of his children.

B. The State of New York improperly awarded the plaintiff a share of the enhanced value of Dr. Baker's medical license as the Thirteenth Amendment of the United States Constitution provides protection against involuntary servitude.

In the case of Severs v. Severs, 426 So.2d 992 (1983), the wife worked

> . . . to assist her husband in achieving his law degree. After his graduation and entry into private practice, the wife abandoned her career and devoted full time to being a housewife and mother. Id. at 992.
>
> The wife's claim to a vested interest in the husband's education and professional productivity, past and future, is unsupported by any statutory or case law. Indeed, such an award by the trial court would transmute the bonds of marriage into the bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution. Id. at 994.

In this case of Baker v. Baker, there is not any documentation of the plaintiff making any contribution to the degree as third parties totally financed the defendant's degree. In addition the defendant secured over $100,000.00 in loans which he alone is responsible for.

Regardless of the wife's contribution, the ruling of Severs, makes an enhanced earning calculation award a violation of of Amendment XIII of the United States Constitution.

Furthermore, the Supreme Court in this case utilized earnings over Dr. Baker's entire work life expectancy for the calculations (Appendix pg. 9a and 13a). This indentures Dr. Baker into a lifetime bond of involuntary servitude creating an even greater injustice contrary to Amendment XIII of the United States Constitution.

C. The State of New York has improperly determined that degrees are property, therefore the enhanced earning capacity award on a degree is contrary to Amendment IV of the United States Constitution.

Amendment IV of the United States Constitution states that the people have the right,

"to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,...."

The State of New York has artificially determined that degrees are property contrary to other states' opinions. The arguments by most courts against awarding a portion of a degree are best stated in the cases below. Each case involved a spouse wanting a portion of enhanced earning capacity from a degree acquired during a marriage.

"It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term."

In re. Marriage of Graham, 194 Col. 429, 432; 574 P.2d 75, 77.

"By classifying an education or degree as property, the courts, in reality, treat as property the future enhanced earning capacity that may result from the education. Enhanced earning capacity is not property. It is not vested; it is only an uncertain expectancy, for it is dependent upon the future success and efforts of degree holder."

Lesman vs. Lesman, 452 N.Y.S.2d 935,938; 88 A.D.2d 153.

"Appellate courts have passed upon the issue. The majority view is that these items are not property and that a wife who contributes to her husband's professional education may not, upon divorce receive an award for her contributions."

Lesman, page 937 (For a list of 13 references, see Lesman v. Lesman supra page 937).

"Most courts which have considered this question have held and we agree, that an educational degree is not property because, '. . . it does not have an exchange value on an open market or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and was not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. . .' It could not be acquired by mere expenditure of money."

GrossKoph v. GrossKoph 677 P.2d 814, 816.

"Professional degree should not be equated with goodwill which as we noted in Stern, may, in given case, add economic worth to a property interest. Stern v. Stern, 66 N.J. at 346-47 n. 5, 331; A.2d 257 (1975).

The value of a professional degree for purposes of property distribution is nothing more than possibility of enhanced earnings that the particular academic credential will provide. In Stern v. Stern, 66 N.J. at 346-47 n. 5, 331; A.2d

257 (1975), we held that a lawyer's "earning capacity, even where its development has been aided and enhanced by the other spouse . . . should not be recognized as a separate, particular item of property . . . . Potential earning capacity . . . should not be deemed property ...." Moreover, any assets resulting from income for professional services would be property acquired after the marriage; the statute restricts equitable distribution to property acquired DURING the marriage. N.J.S.A. 2A:34-23.

Mahoney v. Mahoney, 453 A.2d 527,532.

In Lesman vs. Lesman, 452 N.Y.S.2d 935,938; 88 A.D.2d 153, the wife was attempting to achieve a portion of her husband's medical degree. She was denied her request on the basis of most of the arguments above and with the following explanation included:

"Every unsuccessful marriage results in the disappointment of expectations, financial as well as non-financial, but it does not result in a financial loss in a commercial sense. The wife, by contributing to her husband's education, follows a plan agreed upon for the joint benefit of both spouses. 'If the plan fails by reason of the termination of the marriage, we do not regard the supporting spouse's consequent loss of expectations by itself as any more compensable or demanding of solicitude than the loss of expectaions of any other spouse who, in the hope and anticipation of the endurance of the relationship and its commitments, has invested a portion of his or her life, youth, energy and labor in a failed marriage.' (Mahoney v. Mahoney, 182 N.J.Super.598, 614; 442 A.2d 1062, supra.)"

Lesman, at 940-941.

Mrs. Lesman was granted custody of the children. Lesman, at 937. Therefore Dr. Lesman lost expectations of his relationship and of the joy of raising his two children. He was not compensated for his loss of expectations, as Mrs. Lesman was not compensated for her loss of expectations of future financial gain.

Like Dr. Lesman, Duane Baker, the Defendant, also lost any expectations he had of the marital relationship and lost part of the joy of raising his three children as custody was given to their mother.

Dr. Lesman's "full cost of tuition, books, and other school expenses for his medical education was approximately twenty-five to thirty thousand dollars. This was paid for by the husband from his savings, a New York State Higher education loan and personal loans. In 1972 or 1973, the wife went to New York for a period of five months where she worked . . . . There is no indication that she contributed any of this amount to her husband." Lesman, 936-937.

In this case, Baker v. Baker, there isn't any documentation of the plaintiff making any contribution to the degree as in fact, third parties totally financed the Defendant's/Appellant's degree. In addition, Dr. Baker secured over $100,000.00 in loans which he alone is responsible for.

D. The State of New York has improperly determined that Dr. Baker's degree was marital property, therefore the enhanced earning capacity award was contrary to Amendment IV of the United States Constitution.

Even if one improperly considers a degree property, then the same rules of property should apply. Even by the rules of property Dr. Baker's degree is not marital property and therefore the enhanced earning capacity is contrary to his Amendment IV rights. Some of the examples discussed below may not necessarily be degrees. However, if one is to consider a degree property, then the same rules of property should equally apply.

"We then turn to FL § 8-201(e) for a

definition of marital property. In general, marital property is any property, however titled, acquired by either or both of the parties during the marriage.... Expressly excluded is property acquired by inheritance or gift from a third party, property excluded by valid agreement, or property 'directly traceable' to nonmarital sources. code, Family Law, § 8-201 (e) (Maryland)."

Melrod v. Melrod, 574 A.2d 1,3 (Md.App. 1990).

If the degree is considered to be property, then the rules of property should apply. Duane Baker's parents financed all medical school expenses during his first year, while the Air Force paid for all medical school expenses for the remainder of medical school, plus the Air Force paid a bimonthly stipend (Under 10 U.S.C. § 2120 - 2127 Chapter 105 - "Armed Forces Health Professions Scholarship Program"). This makes the degree property from a party other than the spouse. Therefore, Duane Baker's degree is not marital property, and Donna Baker is not entitled to any portion of that property.

The "Source of Funds Rule" found in Hill v. Hill, 747 S.W.2d 718 and Pope v. Pope, 587 A.2d 481, also helps define marital property.

"Under 'source of funds' rule, property is

considered to be acquired, not when title passes, but as it is paid for.... Incremental property values are allocated proportionately to either marital or separate estates according to source of funds used to purchase property.

Hill v. Hill, 747 S.W.2d 718, 719.

"Appropriate analysis for determining whether property is nonmarital or marital property for purposes of monetary award in divorce proceedings is source of funds theory, rather than inception of title theory."

Pope v. Pope, 587 A.2d 481.

The commencement of the divorce action was on September 8th, 1989. All loan repayments payments made by Duane Baker to his parents were made after the commencement of the lawsuit. The time commitment to the Air Force for payment of entire medical school expenses plus a stipend did not start until after 2 or 3 June 1990 (also after the commencement of the lawsuit). If repayment on the degree started after the divorce action, then no marital funds were used in its acquisition. Therefore, if the degree is considered property and its payment clearly started after the divorce action, it is not "marital property", and Donna Baker is not entitiled to any portion of that property.

Furthermore, degrees are not considered marital property when it would have been obtained with or without the spouse.

"Husband's master's degree in accounting was not property subject to vision in divorce proceeding.....furthermore, husband testified that he would have put himself through school with employment and loans whether married or not."

GrossKoph v. GrossKoph, 677 P.2d 814, 816.

Donna Baker, the plaintiff, admitted that Duane Baker being a medical doctor is "somewhat of a family tradition" when under direct examination by her own attorney. Transcript vol. II pg. 161. This shows that even she recognized that Duane Baker would have become a medical doctor with or without her. Therefore, as in GrossKoph, Duane Baker's degree should not be property subject to division.

This "tradition" was supported by Duane Baker's parents by giving him $80,000.00 for college (transcript vol. V. pg 757) and then giving loans of $74,000.00 for medical school costs, living expences, and other expences (trascript vol. V pg. 758). The testimony is

corroborated by Joyce G. Baker (trans. vol. VI p. 833-872), and not refuted anywhere by the plaintiff. This supports the concept that the degree is a "family tradition". It is natural for professionals to want their children to follow their footsteps and to support those goals.

Therefore, even under the rules of property the State of New York improperly determined that Duane Baker's degree was marital property and improperly awarded his spouse a share of it. This constitutes an unreasonable seizure of property contrary to Amendment IV of the U.S. Contitution.

E. The State of New York improperly included income from extra hours worked from overtime, nights, and holidays, into it's enhanced earning capacity calculations which is contrary to the Thirteenth Amendment of the United States Constitution.

An enhanced earning capacity determination is based on the extra earnings one would achieve solely due to the degree. Common sense dictates

that extra income from extra hours worked is not an enhancement by the degree. It is a product of extra labor by the worker. Therefore, not adjusting for extra hours worked such as overtime, nights, and holidays, in such awards is improper and constitutes slavery.

F. The State of New York improperly awards attorney's fees in enhanced earning capacity cases contrary to contrary to the Fourteenth Amendment of the United States Constitution and other state decisions.

Amendment Fourteen of the United States Constitution Section 1 states

"...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws."

Having the degree holder pay for both sides legal fees in enhanced earning capacity cases deprives the degree holder of "due process" and denies him "equal protection of the laws" as both parties should be placed 'on par' in defending their rights.

"The wife also argues that under the equitable distribution award, husband retains

substantial property. However, counsel fees are not "to be awarded to either spouse automatically... Actual need must be shown in order to justify an award... so that both parties are placed 'on a par' in defending their rights." Dech, 342 Pa.Super. at 23, 492 A.2d at 44; citing Hoover v. Hoover, 288 a.Super. 159, 161-62, 431 A.2.d 337, 338 (1981). The trial court properly concluded that wife had not established actual need for payment of her counsel fees."

Diamond v. Diamond, 519 A.2d 1012, 1019.

"Award of attorney fees in action for equitable distribution, where wife had not been found to be 'dependent spouse,' was not proper."

Patterson v. Patterson, 343 S.E.2d 595, 597.

Having just one party pay for legal fees leads to an inherent unfairness in the negotiation process that leads to abuse. It predisposes the non-paying party to continue to hold out for "pie in the sky" requests at no cost to them. Since the plaintiff's lawyer was paid by the hour it is not in his financial best interest to try to settle the case early. Since the defendant's trial lawyer was paid by the hour, it was not even in his financial best interest to try to settle the case early. It was not even in the defendant's lawyer's financial best interest to win the case at the trial level

as he could collect more money for an appeal. The result is a form of legal blackmail, the defendant either accepts an unreasonable offer, or pays double the amount of escalating legal fees.

In Maloney v. Maloney, 524 N.Y.S.2d 758, the wife was employed earning an annual salary of $17,500 and recieved a distributive award of over $150,000.00. The Supreme Court, Appellate Division, Second department confirmed that she should not be entitled to attorney's fees.

Donna Baker was financially independent, and in her chosen profession, and was making $23,000.00 per year at the date of the trial, and now makes over $25,000.00 per year (Donna Baker trans. vol. IV p. 526-527). The Supreme Court awarded Donna Baker a distributive award of $142,092.00. As in Maloney, Donna Baker should not have been awarded attorney's fees as she is financially independent, earns significantly more than the wife in Maloney, and received a comparable sizable distributive award.

G. Award of attorney's fees is improper

when the actual proceedings were improper.

The defendant should not have to pay the opposing side's attorney's fees in a matters that attempt to violate his own constitutional rights. Instead the plaintiff should pay the defendant's attorney's fees.

H. The State of New York improperly awarded maintenance contrary to Amendment XIII of the United States Constitution.

Maintenance is designed to give the spouse economic independence (see, O'Brien v. O'Brien, 66 N.Y.2d 576, 585, 498 N.Y.S.2d 743, 489 N.E.2d 712), and should continue only as long as is required to render the recipient self-supporting (see, Cohen v. Cohen, 154 A.D.2d 808, 546 N.Y.S.2d 473; Oswald v. Oswald, 154 A.D.2d 817, 818, 546 N.Y.S.2d 475).

De La Torre v. De La Torre, 583 N.Y.S.2d 479, 480, 481.

"Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow 'the recipient spouse an opportunity to achieve (economic) independence' (Assembly Memorandum, 1980 N.Y. Legis. Ann., at 130)"

O'Brien v. O'Brien, 498 N.Y.S.2d 743,747.

The maintenance award therefore should be in an amount and for a time period sufficient to give a spouse reasonable period of time in which to learn or update work skills and to enter

employment market with view to becoming self-supporting. McKinney's DRL § 236, Pt. B, Subd. 6.

Sperling v. Sperling, 567 N.Y.S.2d 538.

In each of the cases above it is clear that the spouse should only recieve maintenance until they are financially independent or self supporting. Donna Baker was already self supporting in her chosen profession at the time of the trial, therefore the award of maintenance was improper and further indentured Dr. Baker into involuntary servitude contrary to Amendment XIII of the United States Constitution.

Furthermore the petitioner wishes to expand a further consideration on this issue in going back to Mahoney, and Lesman,

"Every unsuccessful marriage results in the disappointment of expectations, financial as well as non-financial, but it does not result in a financial loss in a commercial sense. The wife, by contributing to her husband's education, follows a plan agreed upon for the joint benefit of both spouses. 'If the plan fails by reason of the termination of the marriage, we do not regard the supporting spouse's consequent loss of expectations by itself as any more compensable or demanding of solicitude than the loss of expectaions of any other spouse who, in the hope and anticipation of the endurance of the relationship and its commitments, has invested a portion of his or her life, youth, energy and

labor in a failed marriage.' (Mahoney v. Mahoney, 182 N.J.Super.598, 614; 442 A.2d 1062, supra.)"

Lesman at 940-941.

Mahoney, and Lesman, both refer to the multifaceted aspects of a marriage; the relationship aspects and the monetary aspects. There is the physical aspect to marriage also. It is improper for New York State or the United States Government to mandate that any aspect of the marriage continue after a divorce as it is involuntary servitude and contrary to Amendment XIII of the United States Constitution. Continuing the monetary aspect of a relationship when the spouse is economically independent and in their chosen profession is improper. It is just as improper as the government ordering any other part of the relationship to continue after the marriage, such as sex.

CONCLUSION

The use of religion to award child custody

is contrary to Dr. Baker's United States Constitution Ammendment I rights. It is imperitive that the United States Supreme Court grant Certiorari as any return of issues back to the trial court are only subject to more of the same unjust coloring of decisions that are evident throughout this case. The petitioner should be allowed to present this case to the Court in order that it's decision will restore his Amendment 1 rights by granting him primary physical and legal custody of his children.

This case also presents for the Court's review the problem with New York States' use of O'Brien, to call a degree property. The State of Florida maintains in Severs, that such determinations "transmute the bonds of marriage into bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution."

Furthermore the State of New York has claimed that a degree is property while other states clearly disagree. Such an award is contrary to the Petitioner's United States

Constitution Amendment IV rights as the State of New York is making an award against property that it has ficticiously created.

The following actions of the State of New York are contrary to Amendment XIV of the United States Constitution.

1) The state cannot award a property determination on something that is not property.

2) To have one side pay for all the attorney's fees in such matters is a violation of due process as both parties need to be placed 'on par' in defending their rights in such cases.

3) Even if one would call a degree property. The New York determination conflicts with the "Source of Funds" rule used in Hill, and Pope. Dr. Baker's degree was totally financed by his parent's and the United States Air Force and no marital funds were used as all repayments were after the commencement of the divorce. In addition Donna Baker admitted that his degree was a family tradition illustrating that he would have obtained it with or without her. The State of New York thus improperly acted to seize this

non-marital property contrary to his Amendment IV and XIV rights.

The State of New YorK improperly imposes maintenance payments when the spouse is economically independent and in their chosen profession. This is just as improper as mandating that any other aspect of a marital relationship be continued post divorce and therefore is contrary to Amendment XIII of the United States Constitution.

It is imperitive that the United States Supreme Court grant Certiorari to allow the Petitioner to present the Court with a case appropriate to render a decision which will abolish the unjust slavery imposed apon him and abolish the unjust costs of depriving him of his constitutional rights.

This practice undoubtably had it's roots from earlier times when divorce was rare and a woman would not have much possibility of finding gainfull employment. Times have changed and

women now have good access to the job market. In fact, many women now have to support their husbands post-divorce. This turnabout is also unjust.

It is respectfully submitted that it is time to put this archaic practice to rest as both parties have access to the job market and continuing support post-divorce truly is involuntary servitude.

APPENDIX

TABLE OF CONTENTS

Page

Order of the New York Court of Appeals dismissing a motion for leave to appeal to the Court of Appeals . . . . . 1(a)

Order of the Supreme Court of the State of New York Appellate Division, Fourth Department . . . . . 2(a)

Memorandum and opinion of the Supreme Court of the State of New York Appellate Division, Fourth Department . . . . . 3(a)

Order of the Supreme Court of the State of New York Appellate Division, Fourth Judicial Department denying motion for leave to file a petition for reargument or leave to appeal to the Court of Appeals . 5(a)

Decision regarding Calculation of Dr. Baker's Medical Degree from the State of New York Supreme Court (trial court) . . . . . 6(a)

Findings of Fact and Conclusions of Law of the State of New York Supreme Court (trial court) . . . . . 16(a)

Judgement of Divorce of the State of New York Supreme Court (trial court) . . 30(a)

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of January 1995

PRESENT, HON. JUDITH S. KAYE
Chief Judge, presiding.

4-14 Mo. No. 1383

DONNA L. BAKER, RESPONDENT,
V
DUANE C. BAKER, APPELLANT.

(FILED 17 January 1995)

A motion for leave to appeal to the Court of Appeals in the above care heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constituition.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

0915

PRESENT: PINE, J.P., BALIO, FALLON, WESLEY, DAVIS, JJ.

DONNA L. BAKER, RESPONDENT,
V
DUANE C. BAKER, APPELLANT.

(FILED JULY 15, 1994)

The above named Duane C. Baker having appealed to this Court from the judgement of the Supreme Court, entered in the Onondaga County Clerk's office on December 28, 1992, and said appeal having been submitted by Duane Baker, appellant, Vincent Finocchio, Jr., of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgement so appealed from be and the same hereby is unanimously modified on the law by vacating the third decretal paragraph and so much of the sixth decretal paragraph as orders payment of

maintenance and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court for further proceedings in accordance with the Memorandum which is hereby made a part hereof.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

0915 MEMORANDUM

PRESENT: PINE, J.P., BALIO, FALLON, WESLEY, DAVIS, JJ.

DONNA L.. BAKER, RESPONDENT,
V
DUANE C. BAKER, APPELLANT.

(FILED JULY 15, 1994)

Judgement unanimously modified on the law and as modified affirmed without costs and matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum: Supreme Court erred in ordering defendant to pay open-ended maintenance consisting of the mortgage, taxes, insurance and "all basic utility expences to maintain the marital residence" until the emancipation of the children or the death of

plaintiff. Such open-ended payments are improper (see, 22 NYCRR 202.50 (b) Appendix B; Weinstein v. Weinstein, 125 AD2d 301, 303; Belcastro v. Belcastro, 104 AD2d 625; see also Chasnov v. Chasnov, 131 AD2d 624, 625). The court further erred in ordering defendant to pay as maintenance the full amount of housing expences for the marital residence when the court also ordered defendant to pay child support. Because child support includes an allowance for housing expences, the children's share of those expences must be deducted from the total amount of housing expences when maintenance is calculated (see, James v. James, 169 AD2d 441, 442; ScheinKman, Supp Practice Commentaries, McKinney's Cons Laws of NY, BooK 14, Domestic Relations Law C240:27, 1994 PocKet Part, at 259).

With respect to child support, the record does not clearly establish what amount was ordered. The court should have computed the amount in accordance with the Child Support Standards Act.

Thus, we vacate the third decretal paragraph

and so much of the sixth decretal paragraph as orders payment of maintenance and remit the matter to Supreme Court for proper computation of child support and maintenance. (Appeal from Judment of Supreme Court, Onondaga County, Hayes,J. - Equitable Distribution.)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

MOTION NO. 915/94

PRESENT: PINE, J.P., BALIO, FALLON, WESLEY, DAVIS, JJ.

DONNA L. BAKER, RESPONDENT,
V
DUANE C. BAKER, APPELLANT.

(FILED September 30, 1994)

Appellant having moved for reargument of or, in the alternative, leave to appeal to the Court of Appeals from the order of this Court entered July 15, 1994,

Now, upon reading and filing the statement of Duane C. Baker filed August 9, 1994, the notice of motion with proof of service thereof,

and due deliberation having had thereon,

It is hereby ORDERED, that the motion be, and the same hereby is, denied.

STATE OF NEW YORK SUPREME COURT
COUNTY OF ONONDAGA

DECISION

RJI NO. 33-89-3439
INDEX NO. M-1348-89

PRESENT, HON. LEO F. HAYES

DONNA L. BAKER, PLAINTIFF,
V
DUANE C. BAKER, M.D., DEFENDANT.

(Dated: December 11, 1992)

APPEARANCES: Vincent J. Finocchio, Jr., Esq.
Attorney for Plaintiff
333 East Onondaga Street
Syracuse, New York 13202

Richard Alderman, Esq.
Attorney for Defendant
555 Empire Building
Syracuse, New York 13202

At this juncture, the Court considers the valuation of the medical license of Dr. Duane C. Baker. In evaluating the worth of the medical license, the Court had the benefit of testimony by two experts. Dr. Jerry Miner, a professor of

economics at Syracuse University, with a Bachelors Degree, Masters Degree and PH.D. in Economics from the University of Michigan, testified on behalf of the plaintiff, Donna L. Baker. T. Kevin Fahey, an Attorney and Certified Public Accountant, testified on behalf of defendant Duane C. Baker.

As the experts themselves noted, they are not in disagreement on the basic methodology of the computation.

The parties were married on January 6, 1978. During their marriage the defendant, Duane Baker, having finished college, did graduate work for two years at Vanderbilt University, then attended medical school at the Upstate Medical Center in Syracuse. He did a first year of internship at Upstate starting in July of 1986 and began a residency in July of 1987. He completed his medical residency in anesthesiology in the summer of 1990. The parties' matrimonial action commenced on September 18, 1989.

While Dr. Baker is not yet board certified in Anesthesiology, it appears that he is board

eligible. Dr. Baker took the written exam for the board certification following completion of his residency and passed the written exam. He has failed the oral exam on his frist attempt.

The experts are in agreement that for purposes of valuing the medical license of Dr. Baker, one should compare his earnings over the course of his career as a physician as against those earnings he would have earned as a four-year college graduate. Both experts have utilized military physician pay as the basis for comparison. The experts have accepted, as has this Court, Dr. Baker's representation that he intends to make the military his career, and does not intend, at some point after this matrimonial action is completed, to enter private practice. I would note, however, that Dr. Baker's own expert testified that rather than the relatively small figures we are discussing for the enhanced pay, if Dr. Baker was to enter private practice, the amount being discussed would be into the seven figures (in excess of a million dollars) rather than the figures being utilized by

accepting Dr. Baker's representations as to his career plans. Dr. Baker himself concedes that while he does not know New York State Pay rates, that an anesthesiologist in private practice in California would earn approximately $150,000 to $180,000 per year as compared to the salary paid to a military physician. In short, reliance upon Dr. Baker's representations as to his career intentions results in a considerable shortfall to Mrs. Baker, it, in fact, he should ever enter private practice.

Mr. Fahey, the expert for Dr. Baker has agreed with Dr. Miner's work life expectancy for the defendant. The work life expectancy figures varied depending upon the date at which the computation was made, but essentially, the work life expectancy of Dr. Baker as of the time of testimony at trial was 27.7 years. Dr. Miner then assumed that promotions would accrue to Dr. Baker on a regular basis in accordance with a typical military career path. However, he did not augment those earnings by certain retention bonuses for a period of five years, in order,

according to Dr. Miner, to present a "conservative projection". Dr. Miner also included variable special pay and additional special pay.

A significant discrepancy between the computation of Mr. Fahey and the testimony of Dr. Miner resulted from Mr. Fahey not including in the pay calcualtions any additional pay for board certification, or for promotion beyond the rank of major. The Court finds Dr. Miner's assumptions on these issues more acceptable that Mr. Fahey's. First, it is conceded by both Mr. Fahey and Dr. Baker that Dr. Baker would make considerably more in private practice than in the military. Assuming that Dr. Baker does not recieve the usual promotions during the course of his military service, it would be reasonable to assume that at some point either the military would discharge Dr. Baker, or that he would voluntarily leave military service. In either case his pay would be considerably higher that that utilized in the prepare charts. Likewise, history indicates that Dr. Baker has been highly

motivated in his career. He attended not only college but graduate school and medical school and completed his residency. There is no reason to presume that at this point Dr. BaKer will perform in anything less than the committed level he has shown in the past. Therefore, to assume no further promotions for this man's entire military career, beyond the ranK of major, is unrealistic.

The Court also note that while there could be disagreement as to the use of board certification pay within these computations of enhanced earnings, nevertheless, the Court thinKs the inclusion is appropriate. Dr. BaKer had completed all of his advance schooling for the medical degree during the course of this marriage, and he had completed both his internship and the vast majority of his his residency prior to the commencement of the matrimonial action. In short, he was well on his way to being board eligible prior to the breaK-up of the marriage. Under these circumstances, to suggest that his board certification is entirely

the result of effort put forth after the commencement of the matrimonial action is unrealistic and will not be adopted by the Court.

The last item that merits discussion is the use of a discount rate. Both experts are in agreement that a discount rate should be applied, and defendant's expert indicates that a discount rate could reasonably be found to be anything in the two to four percent range, though he favors the use of the figure of three percent. Mr. Fahey conceded that he could not find fault with Dr. Miner's use of the two percent figure, however, and it is that figure which is adopted by the Court.

Both experts agree that Dr. Baker should be credited for the tax effect on his enhanced earnings. In short, enhanced earnings should be reduced by the taxes that Dr. Baker will be expected to pay over the course of his career. Dr. Miner calculated taxes at two possible rates, a 29 percent marginal rate and a marginal tax rate of 39.9 percent. In utilizing the 29 percent rate he presumed a federal marginal tax

rate of 24 percent and a state marginal tax rate of 5 percent. In utilizing this figure of 39.9 percent, Dr. Miner considered a federal marginal tax rate of 34 percent and a state marginal tax rate of 5.9 percent. Dr. Baker's expert, Mr. Fahey, felt that the appropriate tax rate was a percent marginal tax rate, assuming a 28 to 33 percent swing on the federal marginal tax rate and a five percent state marginal tax rate. The Court feels that the highest marginal tax rate is the appropriate figure and, therefore, adopts the highest possible tax rate of 39.9 percent.

In sum, the Court has relied upon the worklife expectancy which has been agreed upon by both experts, a discount rate of two percent, which is acceptable by both experts, and the most conservative tax rate of 39.9 percent. The Court's use of the basic pay scale for a military physcian is not disputed. The Court is considering that Dr. Baker will eventually become board certified and that Dr. Baker will recieve promotions over the course of his military career. Utilizing all of these assumptions and

the figures as provided by the experts, this results in enhanced earnings as a result of Dr. Baker's education over and above the bachelor's degree he held at the time of his marriage, of $426,276.00.

The Court Does not find credible proof offered on behalf of Dr. Baker that he should be credited for $74,000 for loans allegedly due and owing his parents as a result of monies advanced by them for his medical education. Dr. Baker offered no documentary evidence whatsoever to support the existence of these loans, and acknowledges that no promissory notes or loan documents of any kind were ever signed, nor were the debts memorialized in any writing. Accordingly, the Court will not reduce the enhanced earnings figure for any claims of debts owed to Dr. Baker's parents.

The equitable share to which the plaintiff is entitled has been evaluated in accordance with the relevant statutory factors of Domestic Relations Law §236(B)(5)(d). The plaintiff, Donna L. Baker's contributions during the

marriage to the defendant's enhanced earning capacity were primarily those of a supportive spouse, mother and homemaker, and were considerable. Throughout the period of Dr. Baker's education, the parties frequently located in support of Dr. Baker's pursuit of his medical license. As Dr. Baker himself has indicated, he kept long hours, was unavailable to the family and the plaintiff essentially was forced to raise the children herself. Additionally, as the record reflects, all of this was done at considerable financial sacrifice and in lieu of the plaintiff pursuing her own graduate schooling and career interests. The parties met while both were students at Arizona State University. Donna Baker recieved an opportunity to enter into an Internship at Yale University following college to pursue her career in Dietetics. However, she ultimately forfeited her internship and returned to Nashville to remain with Dr. Baker and be supportive of his graduate schooling in Tennessee. Donna Baker was employed essentially all of the time that she was with Dr. Baker until

the birth of their first child. She continued to work as time allowed in between and following the births of the parties' three children. Her entire income during their marriage was used for marital expences. It is this Court's determination that plaintiff is entitled to 33-1/3 percent of defendant's enhanced earning capacity, which results in an award to the plaintiff of $142,092.

Submit agreed-upon order accordingly.

STATE OF NEW YORK SUPREME COURT
COUNTY OF ONONDAGA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

RJI NO. 33-89-3439
INDEX NO. M-1348-89

PRESENT, HON. LEO F. HAYES

DONNA L. BAKER, PLAINTIFF,
V
DUANE C. BAKER, M.D., DEFENDANT.

(Dated: December 23, 1992)

The above-entitled action having been duly brought on by the Plaintiff against the Defendant for a Judgement of Divorce, and a true copy of

the summons with notice and verified complaint having been personally served upon the Defendant within the State of New York, and the Defendant having served an Answer with Counterclaim controverting the material allegations of the complaint, and the issues of fact raised by the pleadings having duly come on to be tried before this Court at a Trial Term before the HONORABLE LEO F. HAYES, on the 4th, 7th, and 12th days of November, 1991, and the plaintiff having appeared in person and by her attorneys, FINOCCHIO AND ENGLISH, VINCENT J. FINOCCHIO, JR., ESQ., OF COUNSEL, and the Defendant having appeared in person by his attorneys, ALDERMAN AND ALDERMAN, RICHARD B. ALDERMAN, ESQ., Of Counsel, and further, at the parties request the Court refrained from making a determination subject to ongoing settlement negotiations between the parties up to and including the 5th day of October, 1992, and

The Court having heard the proof of the parties herein in support of the allegations contained in their respective pleadings, and the

Defendant having withdrawn his Answer and Couterclaim relative to and consenting to the Plaintiff being granted a divorce based upon the grounds of cruel and inhuman treatment, and due deliberation having been had, the Court does now find and decide as follows:

FINDINGS OF FACT

1. The Plaintiff and the Defendant were married on the 6th day of January, 1978, in Johnson City, Tennessee.

2. That there are three children born of said marriage: AMY BAKER, born December 1, 1982; KALEN BAKER, born November 15, 1984; and KRISTIN BAKER, born May 20, 1988.

3. At the time of the commencement of this action, both parties were residents of the State of New York, and had resided therein for two years prior to said commencement date.

4. That the Defendant has engaged in a continuous course of conduct toward the Plaintiff which constitutes cruel and inhuman treatment so as to render it unsafe and improper to require the parties to cohabit as husband and wife. Such

cruel and inhuman treatment consisted of the following:

(a) That throughout the term of the marriage, and more particularly since August, 1988, the Defendant refuses to provide fair and adequate support for the Plaintiff and the parties' three (3) infant children. That the Defendant, through most of this period has continually dictated to the Plaintiff the manner that she should make expenditures for household expences, and for along period of time provided her with a twice per month allowance that was totally inadequate for the support of the Plaintiff and the infant children, and any request by the Plaintiff for additional funds for such household needs were met with an angry response by the Defendant, causing the Plaintiff extreme mental anguish and anxiety;

(b) That since on or about August, 1989, the Defendant has repeatedly threatened the Plaintiff by stating he "would prove her an unfit mother" and take the parties' three (3) infant children away from her, causing Plaintiff extreme mental

anguish and anxiety;

(c) That during the year 1986, after having gone through a great deal of marital discord, the parties attended marital counseling at the urging of the Plaintiff, however, after two (2) sessions, the Defendant stated that he did not have any problems and refused to continue said counseling, causing Plaintiff extreme mental anguish and anxiety;

(d) That on or about August, 1986, the Defendant demanded that the Plaintiff and the parties' two (2) infant children move out of the marital residence. That the Defendant telephoned Plaintiff's parents and stated to them that they would have to be financially responsible for the Plaintiff and their two (2) infant children, causing Plaintiff extreme embarrassment, mental anxiety and cruelty;

(e) That since on or about June, 1989,the Plaintif began babysitting other children in order to supplement her allowance from the Defendant, however, the Defendant then demanded that the Plaintiff use the additional funds for

additional household expences that he expected her to pay, causing Plaitiff extreme undue financial hardship, mental anquish and anxiety;

(f) That throughout the term of the marriage,the Defendant has refused to allow the Plaintiff and the parties' infant children to visit with Plaitiff's parents without his permission. That on or about August, 1989, when the Plaintiff's parents came to visit without the Defendant's Knowledge, the Defendant became angry and refused to communicate with the Plaintiff, causing the Plaintiff extreme mental anguish and anxiety;

(g) That from approximately July, 1988, to Jaunuary, 1989, the parties attempted a separation in order to lessen some of the marital stress, and during that time period, the Defendant failed and refused to provide any support to the Plaintiff and the parties' three (3) infant children, causing the Plaintiff extreme financial hardship, whereby she was compelled to seeK public assistance, in spite of the fact that at that time the Defendant was

earning an average of $28,000 per year. That the Defendant, as a condition of his agreeing to a reconcilliation, forced the Plaintiff to agree to pay all expences that she had incurred regarding her relocation to New Jersey, and any expences relative to her supporting herself and the infant children, and that she pay all expences regarding her move backK to Syracuse, causing the Plaintiff extreme mental anguish and anxiety;

(h) That the Defendant has refused to allow Plaintiff to be a joint holder of any banKing accounts with the Defendant. That the Defendant is extremely dictatorial with regards to the parties' finances and refuses to inform the Plaintiff about any issues regarding the parties financial situation. That the Defendant has all of his financial assets in trust with his parents and not the Palintiff nor their children. That this has caused Plaitiff extreme mental anguish and anxiety as in the unfortunate event that the Defendant should become deceased, his financial assets would turn directly over to his parents, leaving the Plaintiff and the parties' three (3)

infant children financially burdened;

(i) That on or about August, 1988, the Defendant had the parties' telephone disconnected stating to Plaintiff that he "wasn't going to pay for her calls", causing Plaintiff extreme mental anguish and anxiety;

(j) That further on or about August, 1988, the Defendant telephoned Plaintiff and stated that he had instructed the utility company to disconnect the electricity at the marital residence and further indicated to Plaintiff that she should have to call and have it reconnected with the bill in her sole name, causing Plaintiff extreme mental anguish, anxiety and embarrassment;

(K) That further on or about August, 1988, the Defendant tooK all of the parties' credit cards and wrote letters to the financial institutions advising them that Plaintiff was no longer allowed to use said credit cards and that Defendant was no longer financially responsible for the Plaintiff, causing Plaintiff extreme mental anguish, anxiety and embarrassment;

(l) That on or about August, 1988, the Defendant took out a public notice in the newspapers stating that he was not financially liable for the Plaintiff, causing Plaintiff extreme mental anguish, anxiety and embarrassment;

(m) That throughout the term of the marriage and continuing to the present time, the Defendant has refused to do any social activities with the Plaintiff and the infant children of the marriage and has refused to discuss any financial problems or any other marital problems regarding the upbringing of the infant children of this marriage with the Plaintiff, causing the Plaintiff extreme embarrassment, mental anguish and anxiety;

(n) That throughout the term of the marriage and continuing to the present day, the Defendant has repeatedly stated to the Plaintiff that the parties' marital debts are all the fault of the Plaintiff and the Plaintiff's mismanagement of the parties' finances, causing Plaintiff extreme mental anguish and anxiety;

5. That as a result of the aforesaid conduct on the part of the Defendant, the Plaintiff has been caused to suffer great mental anguish and pain, which has had a detrimental effect upon her health.

6. That the Plaintiff had done nothing to provoke the aforesaid conduct of the Defendant and has neither forgiven nor condoned such conduct.

7. That five years have not elapsed since the grounds arose upon which this action is based.

8. That there is no decree of divorce between the parties hereto and there isno other judgment or decree between the parties hereto in any other jurisdiction, and ther is no other matrimonial action pending between the parties.

9. That since June of 1990, the Defendant has been gainfully employed as an Anesthesiologist with the rank of Captain, by the United States Air Force. The Plaintiff is gainfully employed as a Registered Dietician by the Onondaga County Health Department.

10. With regard to maintenance and child support, the Court makes the following specific findings in accordance with the provisions of Section 236(B) of the Domestic Relations Law:

A. The Defendant is employed as a Physician by the United States Air Force and his earnings per year as of the time of the trial were approximately $66,000.00. The Court did not find credible Defendant's claimed unreimbursed professional employment expences and finds the sum of $1,000.00 to be the maximum the Court will allow for such expense, Defendant having offered no documentation to support the claims.

B. The Plaintiff is employed as a Registered Dietician and earned $23,037.56 per year as of the date of the trial herein.

11. With regard to equitable distribution, the Court makes the findings of fact and conclusions of law as set forth in its written decision of December 11, 1992, which is attached hereto and made apart hereof. In addition, regarding the personal property owned jointly by the parties as marital property, the Court will

order that the property will be divided 50/50 between the Plaintiff and the Defendant. The Court is unable to make a specific finding as to bank accounts, savings bonds and other personality, as the record is insufficient to particulary identify each of those marital assets. Regarding the marital residence, the Plaintiff is granted exclusive use of the marital residence, and the Defendant is to maitain as maintenance for the Plaintiff, the mortgage, the taxes, the insurance and the basic utility expences associated therewith. If the parties are unable to identify and divide ther personality, the Court will render whatever assistance is neede.

12. The infant children of the marriage have resided with the Plaintiff continuously since their births, and it would be in the best interest of the children if they were to reside with their mother with reasonable visitation to the Defendant.

CONCLUSIONS OF LAW

1. That jurisdiction has been obtained

pursuant to Section 230 of the Domestic Relations Law of the State of New York.

2. The Plaintiff is entitled to a Judgement of Divorce against the Defendant herein pursuant to the provisions of Section 170(1) of the Domestic Relations Law on the grounds that the cruel and inhuman treatment of the Plaintiff by the Defendant has so endangered the mental and/or physical well-being of the Plaintiff as to render it unsafe and/or improper for the Plaintiff to cohabit with the Defendant.

3. That the Plaintiff shall have custody of the minor children of the marriage: AMY ERIN BAKER, KALEN ANDREW BAKER and KRISTEN ELIZABETH BAKER, with liberal and reasonable visitation awarded to the Defendant.

4. That the Defendant shall pay to the Plaintiff child support for the three unemancipated children of the parties pursuant to the Child Support Standards Act. Support shall continue as previously set by the Court. The parties are directed to recompute child support annually per the guidelines and to promptly

exchange W-2 forms and other data so that new payments can commence on or before February 15 of each year.

5. That the Defendant shall be entitled to claim the three unemancipated children of the parties as exemptions on his Federal and State income tax returns commencing 1991 and thereafter provided he promptly and regularly pays the required child support to the Plaintiff for the said children.

6. That all personal property owned jointly by the parties is to be divided equally between the Plaintiff and the Defendant.

7. That the Court continues all present orders, including those relative to maintenance as and for the Plaintiff, by continuing the order requiring the Defendant to pay the mortgage, taxes and insurance and basic utility expenses associated therewith.

8. That all further questions of child support and of enforcement, modification or interpretation of the Judgement of Divorce herein shall be referred to the Family Court of Onondaga

County or any other appropriate jurisdiction.

9. That within ten (10) days after entry with the County Clerk, a copy of the Judgement of Divorce herein shall be filed with the Family Court Clerk in and for the County of Onondaga, pursuant to Section 251 of the Domestic Relations Law.

10. That either party may resume the use of any former of pre-marriage surname, if he or she so chooses.

LET JUDGEMENT BE ENTERED ACCORDINGLY.

STATE OF NEW YORK SUPREME COURT
COUNTY OF ONONDAGA

JUDGEMENT OF DIVORCE
RJI NO. 33-89-3439
INDEX NO. M-1348-89

PRESENT, HON. LEO F. HAYES

DONNA L. BAKER, PLAINTIFF,
V
DUANE C. BAKER, M.D., DEFENDANT.

(Dated: December 23, 1992)

The above-entitled action having been duly brought on by the Plaintiff aagainst the

Defendant for a Judgement of Divorce, and a true copy of the summons with notice and verified complaint having been personally served upon the Defendant within the State of New York, and the Defendant having served an Answer with Counterclaim controverting the material allegations of the complaint, and the issues of fact raised by the pleadings having duly come on to be tried before this Court at a Trial Term before the HONORABLE LEO F. HAYES, on the 4th, 7th, and 12th days of November, 1991, and the plaintiff having appeared in person and by her attorneys, FINOCCHIO AND ENGLISH, VINCENT J. FINOCCHIO, JR., ESQ., OF COUNSEL, and the Defendant having appeared in person by his attorneys, ALDERMAN AND ALDERMAN, RICHARD B. ALDERMAN, ESQ., Of Counsel, and further, at the parties request the Court refrained from making a determination subject to ongoing settlement negotiations between the parties up to and including the 5th day of October, 1992, and

The Court having heard the proof of the parties herein in support of the allegations

contained in their respective complaint and countercalim, and due deliberation having been had, the Court does now find and cite as follows:

ORDERED, ADJUDGED AND DECREED, that, pursuant to the provisions of Section 170(1) of the Domestic Relations Law of the State of New YorK, the marriage between the Plaintiff and the Defendant be, and the same hereby is desolved on grounds that the Defendant has engaged in a course of conduct towards the Plaintiff wich constitutes cruel and inhuman treatment, and it is further,

ORDERED, ADJUDGED AND DECREED, the Plaintiff shall have custody of the minor children of the marriage, with liberal and reasonable visitation awarded to the Defendant, and it is further,

ORDERED, ADJUDGED AND DECREED, that the Defendant shall continue to pay child support pursuant to the prior pending orders of the Court, subject to the provisions of the Child Support Standards Act. The parties are directed to recompute child support annually per the guidlines and to proptly exchange W-2 forms and

other data so that new payments can commence on or before February 15 of each year; and it is further,

ORDERED, ADJUDGED AND DECREED, that the Defendant shall be entitled to claim the three unemancipated children of the parties as exemptions on his Federal and State income tax returns commencing 1991 and thereafter, providing he promptly and regularly paysthe required child support to the Plaintiff for the said children, and it is further,

ORDERED, ADJUDGED AND DECREED, that the Plaintiff shall be entitled to the sum of $142,092.00 as and for the enhanced value of defendant's medical license; and it is further,

ORDERED, ADJUDGED AND DECREED, that the Court shall continue all present orders, including those relative to maintenance of the Plaintiff in that the Plaintiff shall have exclusive use and possession of the marital residence until the emancipation of the children and/or until the youngest child, then surviving, reaches the age of 21, and/or the remarriage or

death of the Plaintiff herein, and direct that as and for maintenance of the Plaintiff that the Defendant is to make all payments of mortgage,taxes and insurance, and all basic utility expences to maintain the marital residence, and it is further,

ORDERED, ADJUDGED AND DECREED, that the Plaintiff is entitled to payment of reasonable attorney's fees and expences relative to the prosecution of this case, and it is further,

ORDERED, ADJUDGED AND DECREED, that the parties are to divide the personal property owned jointly by the parties 50/50 between the Plaintiff and the Defendant. The Court is unable to make a specific finding as to bank accounts savings bonds and other personality, as the record is insufficient to particularly identify each of those marital assets, and it is further,

ORDERED, ADJUDGED AND DECREED, that all future questions of child support and of enforcement, modification or interpretaion of the judgement of divorce herein shall be referred to the Family Court of Onondaga County of any other

appropriate jurisdiction; and it is further,

ORDERED, ADJUDGED AND DECREED, that within 10 days after the entry with the County ClerK, a copy of the judgement of divorce herein shall be filed with th Family Court ClerK in and for County of Onondaga, pursuant to Section 251 of the Donestic Relations Law; and it is further,

ORDERED, ADJUDGED AND DECREED, that either party may resume the use of any former or pre-marriage surname if he or she so chooses.